



DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID: DoD-2021-OS-0004]

RIN 0790-AL20

Privacy Act of 1974; Implementation

AGENCY: Office of the Secretary of Defense (OSD), Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The Department of Defense (Department or DoD) is issuing a final rule to amend its regulations to exempt portions of the system of records titled DoD-0006, “Military Justice and Civilian Criminal Case Records,” from certain provisions of the Privacy Act of 1974.

DATES: This rule is effective on [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Rahwa Keleta, Privacy and Civil Liberties Division, Directorate for Privacy, Civil Liberties and Freedom of Information, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Department of Defense, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700; OSD.DPCLTD@mail.mil; (703) 571-0070.

SUPPLEMENTARY INFORMATION:

Discussion of Comments and Changes

The proposed rule published in the Federal Register on May 25, 2021 (86 FR 28047-28049). Comments were accepted for 60 days until July 26, 2021. A total of one comment regarding the proposed rule was received. Please see a summary of the comment and the Department’s response as follows:

DoD received one substantive comment on the notice of proposed rulemaking (NPRM). The substantive comment on the NPRM objected to the exemptions as undermining the goal of ensuring records are kept and preserved for access at any time. The Privacy Act (5 U.S.C. 552a) generally provides that any person has a right (enforceable in court) of access to federal agency records about themselves that are maintained in a system of records, except to the extent that the information is *protected from disclosure* by one of ten exemptions. Exempting a system of records does not cause information to be destroyed or deleted but allows the agency to withhold records from first-party access for particular reasons as articulated by the exemption rule. Records, even those with applicable exemption rules, are retained in accordance with the requirements of the Federal Records Act and records schedules approved by the National Archives and Records Administration. Having considered the public comment, the Department will implement the rulemaking as proposed.

Background

In finalizing this rule, DoD will exempt portions of the system of records titled, DoD-0006, “Military Justice and Civilian Criminal Case Records,” from certain provisions of the Privacy Act. This system of records describes DoD’s collection, use, and maintenance of records for the handling of Uniform Code of Military Justice (UCMJ) and disciplinary cases within the authority of the DoD. This system of records also includes records created when DoD legal practitioners, in support of the U.S. Department of Justice, prosecute in U.S. District Courts crimes that occurred on military installations or property. Individuals covered by this system of records include armed forces members and others identified in Article 2 of the UCMJ, as well as civilians who are alleged to have engaged in criminal acts on DoD installations and properties.

The purpose of this system of records is to support the collection, maintenance, use, and sharing of records compiled by the DoD for the adjudication and litigation of

cases conducted under the UCMJ, as well as criminal proceedings brought in U.S. District Courts for offenses occurring on DoD installations or property. This system contains information, records, and filings publicly accessible on the Department's court docket. It also supports the compilation of internal statistics and reports related to these activities. The collection and maintenance of this information by the DoD is necessary to meet its statutory obligations and ensure good order and discipline.

The DoD is amending 32 CFR part 310 to add a new Privacy Act exemption rule for DoD-0006, "Military Justice and Civilian Criminal Case Records." Some of the records that are part of this system of records may contain classified national security information, and the disclosure of those records to an individual may cause damage to national security. The Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), authorizes agencies to claim an exemption for systems of records that contain information properly classified pursuant to executive order. The DoD is claiming an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain record-keeping and notice requirements pursuant to 5 U.S.C. 552a(k)(1), to prevent disclosure of any information properly classified pursuant to executive order, as implemented by DoD Instruction 5200.01 and DoD Manual 5200.01, Volumes 1 and 3.

The DoD also is exempting this system of records because these records support the conduct of criminal law enforcement activities, and certain requirements of the Privacy Act may interfere with the effective execution of these activities, and undermine good order and discipline. The Privacy Act, pursuant to 5 U.S.C. 552a(j)(2), authorizes agencies with a principal law enforcement function pertaining to the enforcement of criminal laws (including activities of prosecutors, courts, etc.) to claim an exemption for systems of records that contain information identifying criminal offenders and alleged offenders, information compiled for the purpose of criminal investigation, or reports compiled during criminal law enforcement proceedings. Additionally, the Privacy Act,

pursuant to 5 U.S.C. 552a(k)(2), authorizes agencies to compile investigatory material for law enforcement purposes, other than materials within the scope of 5 U.S.C. 552a(j)(2). The DoD is claiming exemptions from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain record-keeping and notice requirements, pursuant to 5 U.S.C. 552a(j)(2) and 552a(k)(2), to prevent the harms articulated in this rule from occurring. In addition, records in this system of records are only exempt from the Privacy Act to the extent the purposes underlying the exemption pertain to the record.

A notice establishing this system of records was published in the Federal Register on May 25, 2021 (86 FR 28086-28090). This system of records went into effect on May 25, 2021; however, comments on the Routine Uses were accepted through June 24, 2021. At the end of the comment period, one non-substantive comment was received. The Routine Uses went into effect at the close of the comment period.

Regulatory Analysis

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that this rule is not a significant regulatory action.

Congressional Review Act

This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. Chapter 6)

The Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency certified that this rule does not have significant economic impact on a substantial number of small entities because it is concerned only with the administration of a Privacy Act system of records within the DoD.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that this rule does not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Section 202, Public Law 104-4, “Unfunded Mandates Reform Act”

It has been determined that this rule does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that it will not significantly or uniquely affect small governments.

Executive Order 13132, “Federalism”

It has been determined that this rule does not have federalism implications. This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or effects the distribution of power and responsibilities between the Federal Government and Indian tribes. This rule will not have a substantial effect on Indian tribal governments.

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, 32 CFR part 310 is amended as follows:

PART 310—[AMENDED]

1. The authority citation for 32 CFR part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

2. Section 310.13 is amended by adding paragraph (e)(5) to read as follows:

§ 310.13 Exemptions for DoD-wide systems.

* * * * *

(e) * * *

(5) *System identifier and name.* DoD-0006, “Military Justice and Civilian Criminal Case Records.”

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1); (e)(2); (e)(3); (e)(4)(G), (H), and (I); (e)(5); (e)(8); (f); and (g) of the Privacy Act to the extent the records are subject to exemption pursuant to 5 U.S.C. 552a(j)(2). This system of records is exempt from 5 U.S.C. 552a(c)(3); (d)(1), (2), (3), and (4); (e)(1); (e)(4)(G), (H), and (I); and (f) of the Privacy Act to the extent the records are subject to exemption pursuant to 5 U.S.C. 552a(k)(1) and (k)(2).

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsection (c)(3), (d)(1), and (d)(2)--(I) Exemption (j)(2).* Records in this system of records may contain investigatory material compiled for criminal law enforcement purposes to include information identifying criminal offenders and alleged offenders, information compiled for the purpose of criminal investigation, or reports compiled during criminal law enforcement proceedings. Application of exemption (j)(2) may be necessary because access to, amendment of, or release of the accounting of

disclosures of such records could inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records to avoid criminal penalties or disciplinary measures; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to obtain information from future confidential sources and result in an unwarranted invasion of the privacy of others.

(2) *Exemption (k)(1)*. Records in this system of records may contain information that is properly classified pursuant to executive order. Application of exemption (k)(1) may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information.

Disclosure of classified records to an individual may cause damage to national security.

(3) *Exemption (k)(2)*. Records in this system of records may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records or the accounting of records to avoid criminal penalties, civil remedies, or disciplinary measures; interfere with a civil or administrative action or investigation which may impede those actions or investigations; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to obtain information from

future confidential sources; and result in an unwarranted invasion of the privacy of others.

(B) *Subsection (c)(4), (d)(3) and (4).* These subsections are inapplicable to the extent that an exemption is being claimed from subsections (d)(1) and (2).

(C) *Subsection (e)(1).* In the collection of information for investigatory or law enforcement purposes, it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of the investigation or adjudication. In some instances, it will be only after the collected information is evaluated in light of other information that its relevance and necessity for effective investigation and adjudication can be assessed. Collection of such information permits more informed decision-making by the Department when making required disciplinary and prosecutorial determinations. Additionally, records within this system may be properly classified pursuant to executive order. Accordingly, application of exemptions (j)(2), (k)(1) and (k)(2) may be necessary.

(D) *Subsection (e)(2).* To collect information from the subject individual could serve notice that he or she is the subject of a criminal investigation and thereby present a serious impediment to such investigations. Collection of information only from the individual accused of criminal activity or misconduct could also subvert discovery of relevant evidence and subvert the course of justice. Accordingly, application of exemption (j)(2) may be necessary.

(E) *Subsection (e)(3).* To inform individuals as required by this subsection could reveal the existence of a criminal investigation and compromise investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(F) *Subsections (e)(4)(G) and (H).* These subsections are inapplicable to the extent an exemption is claimed from subsections (d)(1) and (2).

(G) *Subsection (e)(4)(I)*. To the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect the privacy and physical safety of witnesses and informants. Accordingly, application of exemptions (j)(2), (k)(1), and (k)(2) may be necessary.

(H) *Subsection (e)(5)*. It is often impossible to determine in advance if investigatory records contained in this system are accurate, relevant, timely and complete, but, in the interests of effective law enforcement, it is necessary to retain this information to maintain an accurate record of the investigatory activity to preserve the integrity of the investigation and satisfy various Constitutional and evidentiary requirements, such as mandatory disclosure of potentially exculpatory information in the investigative file to a defendant. It is also necessary to retain this information to aid in establishing patterns of activity and provide investigative leads. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined through judicial processes. Accordingly, application of exemption (j)(2) may be necessary.

(I) *Subsection (e)(8)*. To serve notice could give persons sufficient warning to evade investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(J) *Subsection (f)*. The agency's rules are inapplicable to those portions of the system that are exempt. Accordingly, application of exemptions (j)(2), (k)(1), and (k)(2) may be necessary.

(K) *Subsection (g)*. This subsection is inapplicable to the extent that the system is exempt from other specific subsections of the Privacy Act.

(iv) *Exempt records from other systems.* In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

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Dated: May 6, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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